

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANNE C. WILSON,

Plaintiff,

Case No. C15-104 RAJ-BAT

V.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff Anne C. Wilson argues that the Commissioner erroneously denied her applications for Supplemental Security Income and Disability Insurance Benefits because the armfully (1) failed at step 2 to consider whether several mental limitations are severe rments; (2) misevaluated the medical evidence; and (3) misevaluated the “other source” n evidence. Dkt. 15, at 1. The Commissioner concedes that the ALJ erred by declining to s several mental impairments but argues harmless error. Dkt. 16, at 15–16. The Court finds e ALJ’s error was harmful and recommends **REVERSING** and **REMANDING** for r administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

After a March 2013 hearing, in June 2013 the ALJ applied the five-step disability process

and found:

Step 1: Ms. Wilson had not engaged in substantial gainful activity since March 8, 2011.

Step 2: Ms. Wilson had the following severe impairments: **affective disorder** and **personality disorder**.

Step 3: These impairments did not meet or equal the requirements of a listed impairment.¹

Residual Functional Capacity (“RFC”): Ms. Wilson had the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations. Ms. Wilson has the mental capability to adequately perform the mental activities generally required by competitive, remunerative work as follows: she can understand, remember, and carry out simple instructions required of jobs classified at a level of SVP 1 and 2, or unskilled work. The claimant can make judgments on simple work-related decisions and can respond appropriately to supervision, co-workers and deal with occasional changes in the work environment. She has no difficulty dealing with the public.

Step 4: Ms. Wilson could not perform her past work.

Step 5: As there are jobs that exist in significant numbers in the national economy that Ms. Wilson can perform, she is not disabled.

Tr. 14–23. Because the Appeals Council denied Ms. Wilson’s request for review, the ALJ’s decision is the Commissioner’s final decision. Tr. 1–4.

DISCUSSION

The Court will reverse the ALJ's decision only if it was not supported by substantial evidence in the record as a whole or if the ALJ applied the wrong legal standard. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). The ALJ's decision may not, however, be reversed on account of an error that is harmless. *Id.* at 1111. The Commissioner concedes that the ALJ legally erred at step 2 because the ALJ failed to review several diagnosed mental impairments. Dkt. 16, at 15–16. But the Commissioner argues that the ALJ's error was harmless. *Id.* Because

¹ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 the Court concludes the error was harmful, it recommends reversing and remanding for further
2 administrative proceedings. Ms. Wilson has not, however, demonstrated reversible error based
3 on the ALJ's determinations that her physical impairments were not severe and did not impact
4 RFC.

5 **1. Harmful Error at Step 2 and the Evaluation of Mental Impairments**

6 The parties agree that the ALJ should have, but did not, evaluate at step 2 the diagnoses
7 that Ms. Wilson suffers from a **learning disorder, attention-deficit disorders, and anxiety**
8 **disorders.** *See* Dkt. 15, at 2–5; Dkt. 16, at 15–16. Nonetheless, the Commissioner argues
9 harmless error because the ALJ considered and rejected all possible issues Ms. Wilson had with
10 concentration, persistence, and pace, and with social functioning at step 3 and in formulating
11 RFC. Dkt. 16, at 15. That argument is unpersuasive because there is no indication the ALJ
12 adequately considered the limitations posed by the unexamined, omitted mental impairments.

13 The ALJ determined at step 2 that Ms. Wilson had the following severe impairments, all
14 of which are mental: **affective disorder** and **personality disorder.** Tr. 15. The ALJ considered
15 but rejected the following impairments as non-severe, all of which are physical: obesity,
16 diabetes, asthma, and uterine cancer. *Id.* Nowhere did the ALJ consider Ms. Wilson's other
17 diagnosed mental impairments. Treating psychiatrist Dr. Janiese Loeken, MD, diagnosed
18 **attention deficit disorder** (“ADD”). Tr. 334, 338, 341448, 752. Examining psychologist Diane
19 Fligstein, PhD, diagnosed a **learning disability** not otherwise specified (“NOS”). Tr. 398.
20 Examining psychiatrist Dr. Karen Ni, MD, diagnosed **panic disorder** without agoraphobia and
21 **generalized anxiety disorder** (“GAD”). Tr. 442. Examining psychologist Dr. Andrea Shadrach,
22 PsyD, diagnosed **attention deficit hyperactivity disorder NOS** (“ADHD”), **anxiety disorder**
23 **NOS**, and **learning disorder NOS.** Tr. 558. In her applications for benefits, Ms. Wilson stated

1 that she was disabled, in part, by **ADHD/ADD, learning disabilities, and PTSD**. Tr. 117, 206.
 2 At the administrative hearing, counsel stated that Ms. Wilson had become debilitated by the
 3 worsening of preexisting **ADHD, anxiety, and a learning disorder**. Tr. 32.

4 The ALJ found that Ms. Wilson had severe mental impairments but legally erred at step 2
 5 by failing to consider **a learning disorder, attention-deficit disorders, and anxiety disorders**.
 6 Because the ALJ nonetheless found other severe impairments and proceeded with the sequential
 7 analysis, the proper question to ask is whether Ms. Wilson suffered harm from the ALJ's failure
 8 to consider these medically determinable, mental impairments when evaluating the evidence and
 9 assessing the remaining steps of the sequential analysis. *See Orn v. Astrue*, 495 F.3d 625, 630
 10 (9th Cir. 2007); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

11 The Court finds that the ALJ harmfully erred by failing to consider a learning disorder,
 12 attention-deficit disorders, and anxiety disorders at step 2, and this omission undermined the
 13 ALJ's evaluation of the evidence and his reasoning in the remainder of the sequential analysis.
 14 *See, e.g., Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012) (holding that because the ALJ
 15 excluded panic disorder from a list of other mental impairments, the RFC determination "was
 16 incomplete, flawed, and not supported by substantial evidence in the record"). At step 3, there is
 17 nothing for this reviewing court to review because the ALJ never evaluated several medically
 18 determinable impairments.² Similarly, neither the ALJ's RFC determination nor his evaluation of
 19 the medical or other evidence can be meaningfully reviewed because the ALJ declined to address
 20 the impact of mental impairments that could conceivably alter the disability determination.

21 The Commissioner argues that Ms. Wilson was not prejudiced by the ALJ's failure to
 22 discuss several, discrete, mental impairments because the ALJ adequately considered Ms.

23 ² The Court therefore declines the Commissioner's invitation, under the guise of harmless error
 review, to act as factfinder with respect to the overlooked mental impairments.

1 Wilson's limitations on concentration, persistence, and pace, and with social functioning. Tr. 16,
2 at 15. The Court disagrees. A learning disorder, attention-deficit disorders, and anxiety disorders
3 are qualitatively different from an affective disorder and a personality disorder. The ALJ's
4 decision to omit the former conditions and to minimize Ms. Wilson's mental limitations by
5 attributing them solely to the latter conditions treads perilously close to a medical presumption
6 that her difficulties can be explained away by depression (affective disorder) or a maladaptive
7 response (personality disorder). *Compare, e.g.*, 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.04
8 ("Affective Disorders") *and* § 12.08 ("Personality Disorders") *with* § 12.06 ("Anxiety-related
9 Disorders"). The ALJ did not fulfill his duty to "set out in the record his reasoning and the
10 evidentiary support for his interpretation of the medical evidence." *Tackett v. Apfel*, 180 F.3d
11 1094, 1102 (9th Cir. 1999). That constitutes harmful error requiring a new hearing and a
12 reevaluation of the evidence regarding Ms. Wilson's mental impairments.

13 **2. Evaluation of Physical Impairments**

14 Almost all of Ms. Wilson's briefing focuses on the omitted mental impairments and how
15 the ALJ mishandled the medical and other evidence regarding her mental impairments. In a
16 subsidiary argument, however, Ms. Wilson argues that the ALJ harmfully erred at step 2 and in
17 determining RFC by declining to adopt the opinion of Monica Negrila, LMHC, that Ms.
18 Wilson's obesity and diabetes result in physical limitations that negatively impact her capacity to
19 work. Dkt. 15, at 15, 17. The Court disagrees.

20 On behalf of IKRON Corporation, Ms. Negrila wrote a one-page summary of Ms.
21 Wilson's participation in a Community Based Assessment ("CBA"). Tr. 991. Ms. Negrila stated,
22 among other things, that Ms. Wilson "was impacted by her physical health (Obesity and
23 Diabetes)" due to barriers involving her "fine and gross motor skills" and "work speed and

1 stamina/endurance.” *Id.* The ALJ gave little weight to Ms. Negrila’s opinion because, among
2 other things, the record did not contain the findings and results from IKRON’s CBA; Ms.
3 Negrila did not state the basis for her opinion; the ALJ had determined at step 2 that Ms.
4 Wilson’s obesity and diabetes were non-severe and did not result in physical limitations; and Ms.
5 Negrila’s opinion was inconsistent with Ms. Wilson’s ability to work after the alleged onset date,
6 including the successful completion of two temporary positions with the King County Elections
7 Board. Tr. 21. At step 2, the ALJ found that Ms. Wilson’s obesity was non-severe because there
8 was no evidence of functional limitations. *Id.* The ALJ noted that Ms. Wilson had not developed
9 any secondary complications due to her weight such as heart disease or musculoskeletal
10 problems, and that her weight had not affected her ability to maintain a full range of daily
11 activities such as performing personal care or household chores. Tr. 15 (citing Tr. 435). The ALJ
12 found that her diabetes was non-severe because it was under good control and she had not
13 developed any complications due to diabetes. Tr. 15 (citing Tr. 406, 417, 481, 805). Moreover,
14 with regard to Ms. Wilson’s physical impairments, the ALJ gave great weight to the opinion of
15 examining physician Dr. Ashley Evans, MD, who opined, consistent with detailed examination
16 findings, that Ms. Wilson had no physical limitations. Tr. 15 (citing Tr. 434–38).

17 Ms. Wilson has not demonstrated that the ALJ legally erred or failed to support with
18 substantial evidence his conclusion at step 2 or in the RFC assessment that Ms. Wilson’s
19 physical impairments are non-severe. The ALJ cited relevant medical and other evidence, and
20 reasonably credited Dr. Evans’s detailed examination notes over Ms. Negrila’s conclusory
21 statements.

22 **CONCLUSION**

23 For the foregoing reasons, the Court recommends that the Commissioner’s decision be

1 **REVERSED** and the case be **REMANDED** for further administrative proceedings under
2 sentence four of 42 U.S.C. § 405(g).

3 On remand, the ALJ should reevaluate the evidence of Ms. Wilson's mental impairments
4 and conduct a new hearing. Ms. Wilson has not, however, demonstrated that the ALJ harmfully
5 erred by concluding that her physical impairments are non-severe.

6 A proposed order accompanies this Report and Recommendation. Any objection to this
7 Report and Recommendation must be filed and served no later than **September 22, 2015**. If no
8 objections are filed, the Clerk shall note the matter for September 25, 2015, as ready for the
9 Court's consideration. If objections are filed, any response is due within 14 days after being
10 served with the objections. A party filing an objection must note the matter for the Court's
11 consideration 14 days from the date the objection is filed and served. Objections and responses
12 shall not exceed ten pages. The failure to timely object may affect the right to appeal.

13 DATED this 8th day of September, 2015.

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15 BRIAN A. TSUCHIDA
16 United States Magistrate Judge
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